

Date: 20081008

Docket: IMM-935-08

Citation: 2008 FC 1135

Ottawa, Ontario, October 8, 2008

Present: The Honourable Mr. Justice Zinn

BETWEEN:

FRANK ATTA FOSU (aka FRANK FOSU ATTA)

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] To say that an internal flight alternative exists if the homosexual refugee claimant lives a “discreet” existence, is to say that it is not an internal flight alternative.

BACKGROUND

[2] This is an application for judicial review of a decision of a member of the Refugee Protection Division, dated February 7, 2008, wherein the Member found that the Applicant was not a Convention refugee or a person in need of protection.

[3] The Applicant is a Ghanaian citizen who claims to fear persecution by the police and the family of his former same-sex partner, Kofi Adu, on the basis of his homosexuality. He says that his problems began after Kofi introduced him to his family as his partner in March 2005. Shortly thereafter, their dog was poisoned and Kofi's store was vandalized. He claims that they were mistreated generally whenever they went about in Berekum, the town in which they lived.

[4] In November 2005, while the Applicant was staying overnight in another town where he was engaged in the construction business, Kofi was severely beaten and later died in hospital. The Applicant saw him prior to his death and Kofi warned him that the attackers had been looking for someone else, whom he supposed to be the Applicant. Mr. Adu's family threatened the Applicant at the funeral service.

[5] The Applicant then went to the chief of the town with some gay friends. The chief told them that they should keep their homosexuality secret and that he did not wish to discuss it. The Applicant then went to stay with a friend in Kumasi. After four weeks, at the end of December 2005, he went to Koforidua to stay with another friend. At the end of January 2006, he was attacked by two men in Koforidua. They claimed that he was a child molester. He was taken to the

police station and detained overnight. He was freed the following day after his friend paid a bribe. He then decided that he should leave Ghana and he fled, via Amsterdam, at the end of April 2006.

[6] After fleeing Ghana, in early May 2006, the Applicant's twin brother was attacked and beaten by men who wished to know where the Applicant was. The attackers threatened his brother with death if he did not tell them.

[7] The Board found that an internal flight alternative existed for the Applicant and therefore held that no determination on his identity as a homosexual needed to be made. It was noted that the Applicant and his partner had reported the death of their dog and vandalism of the shop to police, thereby showing that they did not fear the authorities and expected assistance. It was found that while the Applicant had faced discrimination, it was insufficient to prevent him from living openly with his same-sex partner. The Member found that the Applicant could live as a homosexual, "discreetly", in the city of Accra.

[8] The Member further was not persuaded that Mr. Adu's family was large and resourceful enough to seek the Applicant in all parts of the country, including Accra. She was not persuaded that there was a correlation between the assault the Applicant claims to have suffered in Koforidua was related to his sexual orientation or relationship with Mr. Adu.

[9] As for the reasonableness of the IFA, the Member found that, based on the Applicant's age and employment record, he would not be at a greater disadvantage in finding employment in Accra

than any other Ghanaian. She also found that there was no evidence his family would not support him there. Finally, she found that the discrimination which exists in Ghana against homosexuals is not equivalent to persecution. She found that laws against certain types of sexual behaviour are not, *per se*, persecutory and that, while the Applicant might face sanction if returned to Ghana, it would not be imposed in disregard of acceptable international standards.

ISSUES

[10] The Applicant raised two issues:

- (a) Whether the RPD erred in finding that an IFA existed; and
- (b) Whether the RPD erred in failing to make a finding on the Applicant's claim of sexual orientation?

ANALYSIS

[11] The Applicant submits that a finding of an IFA is reviewable on a test of reasonableness: see *Ramachanthran v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 673 which, before the decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, held that the standard was patent unreasonableness. However, he submits that the failure to make a finding on the Applicant's claim that he is homosexual was a failure to exercise jurisdiction.

[12] The Respondent submits that the finding of an IFA is factual and should not be set aside if it was open to the RPD on the evidence before it. Further, it is submitted that the IFA finding is a

complete answer to a refugee claim and the RPD did not need to address the Applicant's claimed sexual orientation.

[13] The test on the IFA finding is reasonableness. In light of the findings that follow I need not address whether the failure to address the issue of the Applicant's sexual orientation is a failure to exercise jurisdiction. It is very exceptional that a Member would explicitly make no findings on whether the claimant is a member of the social group on which he or she bases the claim for protection. It may be that the failure to make such a finding is an error of law, being as it is the ultimate grounding of the claim. As such, the standard might be seen to be correctness. However, it could be equally argued that the refusal to make this factual finding is perverse and capricious and would fail against the reasonableness standard.

Did the RPD err in finding that an IFA existed?

[14] The finding of an IFA is a two-step test: is there another location within the country where the claimant does not face a serious possibility of being persecuted; and, is it unreasonable for the claimant to move to the IFA, given his or her personal circumstances.

[15] In my view, the Member failed to address evidence which was sufficiently important and relevant to the IFA to make the decision thereon unreasonable. In particular, the failure to address the evidence of the Applicant that he was in hiding before leaving Ghana is a reviewable error. It would not be reasonable, under the second prong of the IFA test, to require the Applicant to remain

in hiding or otherwise conceal his true identity so as to avoid detection by those who would harm him.

[16] Further, there was no evidence with respect to the family of Mr. Adu, other than that of the Applicant. As such, the Member engaged in speculation when finding that Mr. Adu's family's influence did not extend to Accra and this made Accra an IFA.

[17] Further, the Member erred in suggesting that he would find safety in Accra so long as he was "discreet" and appears to have assumed that he could be prepared to do so, and there was no evidence of this, or that he would be able to keep his sexuality secret in such a large city. I cannot accept that the Member's decision can be reasonable in arriving at a finding which requires the claimant to deny or hide the innate characteristic which forms the basis of his claim of persecution: see, for example, *Sadeghi-Pari v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 282, at paragraph 29. The Member was clearly of the opinion that the discrimination the Applicant would face was not tantamount to persecution, but it also appears that she was assessing the danger through the lens of the conditions she would impose on him – conditions that are not reasonable or acceptable.

[18] On this basis alone, the decision must be set aside and referred back for a redetermination by another member. There is no certifiable question and none was proposed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed and the matter is remitted back to the Board for determination by a different member of the Board; and
2. No question is certified.

“Russel W. Zinn”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-935-08

STYLE OF CAUSE: FRANK ATTA FOSU (aka FRANK FOSU ATTA) v.
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 18, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** ZINN J.

DATED: October 8, 2008

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